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CIVIL JUSTICE IN THE MADRAS PRESIDENCY.

We have often remarked that the report of the High Court on the administration of civil justice in the Madras Presidency is more or less a mechanical appraisement of the work done by judicial officers and a mechanical array of the statistics of litigation. The review of these reports by the Government is also usually a mechanical performance administering praise and blame with reference to the quantity of work turned out by judges. The report on the administration of justice for 1897 and the order of the Government in review of it are no exceptions to the rule. It must be admitted that there is very considerable difficulty in determining the quality of the work done by the different courts. But it is all the same a source of discouragement to many a hard-working, conscientious and able officer that his efficiency is judged more by reference to the quantity of his work and his expeditiousness than by reference to its quality. We have often remarked upon the tendency of this kind of criticism to encourage undue speed in the disposal of work to the detriment of justice. We shall, therefore, deal with this part of the subject and make certain observations of a general character before dealing with the work of the different classes of courts.

The first thing that strikes one upon a perusal of the report is a large increase in litigation during the year 1897. The total number of suits instituted in all the Courts in the Presidency including the Revenue and Village Munsifs' courts, was 362,502, or an increase of 27,022 suits over the figures for 1896.(1) There has been an increase in the number of institutions in all the courts, except the revenue courts, where a falling off is to be observed.

(1) There seems to be a discrepancy in this matter between the statement in paragraph 12 of the report and in page vii of the Appendix, where the total is given at 311,001. The number of suits before the courts in 1897 cannot possibly be less than the number of institutions.

Is this increase in litigation any matter for regret? Of course, we put the question only from the public point of view, and not from the professional. An increase of litigation may be due to a variety of circumstances and unless it indicates the growth of litigiousness or a spirit of unwillingness to perform legal obligations it is no cause for regret. The increase may be due to an increase in the number of transactions owing to a period of good season and high credit, or it may be due to a bad season and low credit and a desire to realize claims quickly, or to a number of other causes. While we are not aware of any reasons for regarding the increase of litigation during the last few years with any apprehension, it is worth while to consider whether the statistics of litigation support the charge so often hurled against the people of this country that they are a litigious race and are never satisfied with the decision of a single court, but are fond of appeals to several courts. A careful examination of the statistics of litigation proves the charge to be unwarranted. Several tests may be applied for this purpose, and the result of this test is certainly not in favor of any such conclusion as that referred to above and hastily arrived at by Anglo-Indians who are fond of generalizing from their experience of this country. Take first of all the ratio of suits instituted in all the courts in the Presidency for the total population. For a population of 35,630,440, the total number of suits before the village courts and the civil courts during the year 1897 was only 362,512; which gives a proportion of one suit for every 98 people, or of 1,020 suits for every 100,000 persons. During the year 1896, the latest year for which figures are available to us, the ratio of suits to population in England and Wales was 3,966 for 100,000.

Roughly speaking, the ratio in England was nearly four times the ratio in Madras. We are aware that there are numerous differential circumstances to be taken into account, and any comparison of figures would not be quite safe which proceeded upon the assumption of a complete similarity of conditions between England and India. Making, however, full allowance for the enormous commercial activity in England, for the vast multiplicity of transactions which such activity must involve, it may be said that the figures for India are by no means so large as to give rise to any feeling of alarm or complaint. Another test which may be applied is to consider the proportion of appeals to the appealable cases and of the number of

civil revision petitions in Small Cause cases to the total number of Small Cause suits. Out of a total of 147,169 Small Cause suits instituted in the Provincial Small Cause Courts, revision petitions were presented to the High Court in only 279 cases. The proportion of appeals to appealable cases disposed of by District Munsifs was only 6,797 to 56,652. As suits increase in value, there is no doubt that this proportion also increases. But this is only natural. The pecuniary jurisdiction of the Sub-Courts and District Courts embraces suits of a greater value than Rs. 2,500. And in many cases the valuation adopted for purposes of court fees does not adequately represent the market value of the property in suit. Thus we find that out of a total of 779 appealable decrees passed by the Sub-Courts, 645 were appealed against, and out of a total of 339 appealable decrees passed by the District Courts, 187 were appealed against. This tendency of the proportion of appeals to rise in proportion to the value of the suit may be noticed in England also. While appeals from inferior courts are comparatively few, the proportion of appeals to the Court of Appeal from final judgments or orders of the Chancery Division was in 1896, 167 to 460. The proportion of second appeals from the appellate judgments of Sub-Judges was only 624 to 2,972 contested appeals. The proportion of second appeals from the appellate judgments of District Courts was 1,605 to 8,061. The principle that the chances of an appeal being preferred are greater in regard to suits of large value does not hold good in case of Privy Council appeals, in regard to which various circumstances operate as deterrents. It is significant, however, that the proportion of appeals from India to the Privy Council as compared with the total number of appealable cases is extremely small. (See Civil Judicial Statistics for 1896, p. 19.) Yet another test is the proportion of cases decided in favor of the defendant. Suits which are decided in favor of the plaintiff cannot be assumed to be frivolous or vexatious. By far the greater number of the suits instituted in the courts are instituted for the prosecution of honest claims and rendered necessary, not so much by the wilful denial of the plaintiff's rights by the defendant as by his inability to fulfil his engagements and the desire of the plaintiff to realise his claims with despatch. Out of a total of 256,789 suits instituted in the civil courts of the Presidency, judgment was given for the defendant, or the suit was dismissed *ex parte* only in 21,748 suits. The suits which are disposed of with.

out trial are generally so disposed of in consequence of a settlement of the plaintiff's claim by the defendant.

We have already referred to the fact that there were only 52 appeals to the Privy Council from the whole of India in 1896 as an indication of the poverty of litigants. A better proof is furnished by the small value of litigation generally in the country. Out of a total of 362,512 suits instituted in all the Civil and Revenue courts in the Presidency, the number of suits exceeding Rs. 500 in value, including suits the value of which could not be estimated in money, was only 11,041; and the number of suits exceeding Rs. 1,000, including those which could not be estimated in money, was only 4,995. Small as the amounts in question are, their value to the people who litigate about them is relatively very high. In this connection it is necessary to consider whether the scale of court-fees levied by the Government does not work hardship upon the large mass of poor litigants who seek the assistance of the courts. It is curious to note that the scale of court-fees adopted by the Court Fees Act has been so framed as to bear more hardly upon the poor suitor than upon his richer brother. The rate of *ad valorem* fee leviable upon suits not exceeding Rs. 1,000 is 7½ per cent. of the valuation. But as the value of the suit rises, the rate of court-fee falls. If a litigant with an honest claim has the misfortune to be defeated in two courts and has to seek the assistance of the High Court on second appeal, he would be obliged to spend 22½ per cent. of the value of the property in the shape of institution fee alone, not to speak of the various other expenses which have to be incurred. The different scale of court-fees and the high rates adopted appear to be specially designed to put obstacles in the way of the poor suitor. A stock argument used by the apologists of the present system is that any reduction of court-fees would open the door to a flood of litigation. It is idle to suppose that simply because the institution fee is lowered, people will be tempted to bring in false claims before the courts. False claims are made and will be made under any system of court-fees; and the proper mode of deterring such claims is by mulcting such claimants in costs and not by imposing a heavy court-fee, the difficulty of securing which may operate hardly upon the honest as well as the dishonest suitor. In illustration of our remarks, we may

refer to the new City Civil Court at Madras which has abundantly justified its existence and falsified the forebodings of the persons who opposed its creation. When it was pointed out that the scale of fees in the High Court was such as to throw a comparatively heavy burden upon the suitor in small cases, it was claimed that the High Court system had the merit of repressing litigation and that the people of Madras would be demoralized by a cheap court. The result is instructive.

The annual average of suits instituted in the High Court not exceeding Rs. 2,500 in value during the years 1887 to 1892 was 134. The number of suits instituted in the City Court in 1897 was 381. This means that about 250 suitors per annum were denied justice under the old system. Nor can it be said that these suits were frivolous, when it is remembered that out of a total of 434 suits disposed of during the year, only 125 suits were decided for the defendant. A system which aims at repression of dishonesty by measures productive of hardship to honest people as well stands self-condemned. Nor can the present system of court fees be justified on the ground that it is necessary for the purpose of defraying the cost of administration of justice. Year after year the Government makes an enormous profit by the dispensing of justice.

The surplus revenue derived by the Government after meeting all the charges of the Civil and Criminal courts of the Presidency during the year 1897 was Rs. 14,59,370. Judges and legislators in India often talk with virtuous indignation of the traffic in litigation in this country and are eager to lay down rules to check such traffic.

If any one in this country traffics in litigation and reaps a large profit out of it, it is the Government itself which reaps an enormous profit out of justice every year. We believe the spectacle of a civilized Government making the administration of justice a source of national income will be found to be rather rare. In England the administration of justice far from being a source of income, is a source of expenditure. For the year 1896, the excess of expenditure over receipts for the County and Superior Courts was £ 276,642. It will be well if the Government directed its attention to the reduction of the scale of court-fees, to the introduction of greater

uniformity in the scale and to an increase in the number of the courts and an improvement in their efficiency. A part of this large surplus may well be devoted to the creation of more Munsifs' and Sub-Judges' Courts which will bring a much needed relief to a hard worked class of officers and allow them a little more time to study the law of the cases coming before them and a little more leisure to study their cases than they are at present able to devote with a constant fear of statistics before their eyes.

As to the tests adopted by the High Court for determining the efficiency of judicial officers we have to observe that they are imperfect and fallacious. The so called appeal test adopted by the High Court consists in ascertaining the proportion of appeals to appealable decrees and the percentage of confirmation in appeals. The latter test cannot be regarded as very satisfactory, regard being had to the organization and personnel of the judiciary. If the judiciary were properly appointed, there would no doubt be a presumption that the judgment of the appellate Court is the sounder. But the presumption cannot safely be applied. The consistent application of the confirmation test leads to the conclusion that the efficiency of the courts decreases as the rank of the court rises The ratio of confirmation in appeals from appealable decrees and orders passed by Munsifs is 4,850 out of 7,771 or 62 odd per cent. The ratio of confirmation in appeals from appealable decrees passed by Sub Courts is 194 out of 333 or 58 odd per cent. In appeals from decrees of District Courts the ratio of confirmation is 99 to 167 or 59 odd per cent. In second appeals from the appellate judgments of Sub-Judges the proportion of decrees confirmed to the total number of appeals is 513 to 786 or 65 odd per cent. In second appeals from the appellate judgments of District Judges the per centage of confirmation is 48 odd per cent, 877 cases having been confirmed out of 1817 appeals. If the test of confirmation in appeal proves anything, it proves that the chances of a right judgment are less in the higher courts than in the lower courts. It is somewhat strange that while the report gives the figures of confirmation and appeals for all the subordinate courts in the Presidency, it is altogether silent in regard to the number of cases confirmed on appeal from the Original Side of the High Court and on appeal from the High Court to the Privy Council. The information would certainly be interesting.

Another test of efficiency adopted by the High Court is the proportion of appeals to appealable decrees. This is a far more valuable test than the other one we have dealt with. If a party has the right to appeal against a decree passed against him but does not choose to do so, it is a very strong indication of the fact of his being satisfied that the judgment passed against him is not unjust. We are not unaware of the fact that suitors are very often deterred from preferring appeals by an indiscriminate confirming tendency on the part of the appellate courts or by their own poverty. Making allowance, however, for the influence of the idiosyncrasies of appellate courts and other deterrent circumstances, we think that this test is really very valuable provided the figures are carefully ascertained.

One serious error which vitiates the figures furnished in the report is that in calculating the number of appealable decrees and orders, decrees and orders passed in uncontested suit or appeals are included. In very exceptional cases a party who has not contested a suit may perhaps appeal. But such instances are few and negligible. It would be really useful if the report gave the proportion of appeals to the appealable decrees and orders passed after contest. We have tried to ascertain the proportion of appeals in contested suits and appeals and the results are given below :—

Courts.	Number of appealable decrees and orders passed.	Number appealed against.	Percentage.
District Munsifs' Courts.	36,522 (Contested suits.)	6,797	18 odd.
Sub-Courts	708 do.	345	44 odd.
District Courts ...	339 do.	187	55 odd.
Sub-Courts (in the exercise of appellate jurisdiction.)	2,714 (Contested appeals.)	624	Nearly 23.
District Courts (in the exercise of appellate jurisdiction).	7,033 do.	1,605	22 odd.
City Civil Court ...	241 Contested suits.	24	Nearly 10.

There are a number of errors affecting even the table we have compiled in regard to second appeals. This table does not show nor does the report of the High Court show in how many of the decrees and orders passed by the appellate courts a second appeal was com-

petent under S. 586 of the Code of Civil Procedure. Another fact which must not be lost sight of is that as the value of the suit rises, there is a greater tendency to appeals than in small suits. The conclusion which is suggested by these figures is that the lower tribunals command even more confidence in the soundness of their decisions than the higher tribunals. It may be asked why if the lower tribunals command confidence there are so many appeals from their decisions, or why any appeals should be allowed from their decisions. With all their efficiency, however, it is impossible to expect the lower courts to be invariably right in their decisions. In the very nature of things there must necessarily be a certain percentage of erroneous decisions in these courts, and it is only natural that the parties who are dissatisfied with the erroneous decisions should desire an appeal to a higher tribunal for obtaining that justice which has been denied to them by the court below. Litigants have a right to demand that law and justice should be properly administered and that the machinery for the administration of justice should be so devised as to eliminate or reduce the chances of error and injustice.

What is at fault is not the system of appeals but the mode in which judges are appointed to appellate courts. If greater care were bestowed upon the selection of judges for higher tribunals, the system of appeals could be made as efficient as possible.

Passing on to the work done by the different classes of courts during the year, we find that the work done by the District Munsifs is in quantity and quality of a very satisfactory character. During the year 1897 the total amount of work done by the 114 District Munsifs consisted of 81,690 ordinary suits, 126,169 small cause suits, 186,662 execution petitions, 414 insolvency petitions and 278,841 miscellaneous petitions—a record of work which will compare favorably with that turned out by any class of judicial officers in any part of India. It is obvious that the enormous mass of work represents a very heavy strain upon the energies of District Munsifs—a strain which the Government is bound to reduce by the creation of more District Munsifs both in the interest of justice, suitors and in the interests of its own officers. There is one part of the work done by the District Munsifs which we are afraid is often done in a perfunctory manner and that is in regard to the small cause

work. The tendency, however, is one which can be easily corrected by the free admission of revision petitions and by a greater frequency of interference in revision.

The Presidency Small Cause Court and the City Civil Court of Madras have both a very satisfactory record of performance to show for the last year. The courts which had the lightest work are the District Courts. The total amount of work done by the District Judges during the year under review consisted of 511 ordinary suits, 738 small causes, 8,061 regular appeals, 356 miscellaneous appeals, 1,759 execution petitions, 22 insolvency petitions, 15,403 miscellaneous petitions, 1,129 sessions cases and 1,835 criminal appeals and revisions. The work done by the District Courts must be pronounced to be of not a very satisfactory character whether regard is had to the duration of suits in the District Courts or the proportion of appeals to appealable decrees or the ratio of confirmation of the correctness of the decisions in law or in fact. We have no wish to disparage the work done by these officers, but it must be stated that the efficiency of this class of officers has considerably diminished and is bound to diminish still further unless steps are taken to separate the Judicial from the Executive branch and the Judges are specially trained for the discharge of their duties. In Bombay where the separation of the two branches has been made, the Civilian Judges are far more capable officers than the District Judges in this Presidency.

VALIDITY OF ADOPTION DEVESTING ESTATE.

The rule laid down by the Privy Council in *Chandraballi's* case that an adoption not made to the last full owner and which has the effect of devesting an estate vested in some person as the heir of another was invalid has not been free from difficulty with regard to its applications. There is no Hindu text relied on by their Lordships in support of that view, but their Lordships explain themselves in later cases, *Padma Coomari* v. The *Court of Wards*, 8, I. A., 229 *Thayammal* v. *Venkatarama*, 14 I. A., 67, and *Tharachurn* v. *Suresh-chunder Debi* 16, I.A., 166, as laying down not merely that the adoption did not devest the estate but that the power to adopt has become exhausted and that the adoption itself is invalid, because the spiritual

reasons that justified the concession of the power to adopt no longer existed to keep it alive. It is too late in the day to discuss the soundness or propriety of the rule even if the judgment of so high an authority could be assailed. We are more concerned with the applications of that rule to other cases or the definition of the exact scope of the rule itself. The Privy Council themselves declined to extend the rule to a case where an adoption was made to the last full owner himself, even though it had the effect of devesting the estate, which had vested in his brother. Following the same principle, the Bombay High Court has refused to impeach the validity of the adoption made by the last full owner where it had the effect of defeating the estate of co-widows, *Ramji* v. *Ghaman* I. L. R., 6. B., 498; *Amava* v. *Mahadgauda Ib.* 22, B. 416. These cases are no exceptions to the rule but only illustrations of the principle, that it is not the mere devesting that affects the validity of the adoption, but the fact of its being made to a person other than the last full owner. It does seem to be an exception to the rule where an adoption is made to the mother of the last male owner, the property having passed to her as heir to her son on his death leaving no widow or issue. See 4. I. A., p. 1. The only justification for this is that it has the effect of devesting no estate but her own. But this is not altogether accurate, because it would have the effect of defeating the estate of reversioners who are entitled to the property after the mother. *Gavadappa* v. *Girimallappa* I. L. R., 19, B., 331. Nor does it seem in this case that the mother's estate is devested, for the adopted son is only a brother to the last male owner and is a remoter heir than the mother herself. But if the son in this case had died leaving a widow and the adoption is made after the widow's death and the mother had succeeded to the property, it would still be invalid because on the vesting of the property in the son's widow the power to adopt was at an end and could not be revived by the subsequent death of the son's widow. The validity of the adoption where the mother succeeds to the son directly there having been no intermediate heir, and adopts to her own husband, opens the door to a further question whether the assent of those whose estate would be devested would have the effect of validating adoptions, otherwise invalid. In Bombay, the view has been taken that it would have *Ramji* v. *Ghaman* I. L. R., 6 B., 498. *Rupchand*

v. *Rukhmabai* 8. B. H. C. R., 114, and other cases reported in the printed judgments of Bombay. The Madras High Court, however, has refused to take that view, *Annammah* v. *Mabbu Bali Reddey* 8. M. H. C. R., 108.

The question, however, remains as to the validity or otherwise of an adoption made to a deceased member of an undivided Hindu family when the family itself continues in the persons of members, who, it may be, were or were not in existence at the time of the death of the person to whom the adoption was made. This was very fully discussed in *Chandra bin Babu* v. *Gojara Bai* I. L. R., 14 B., 463, where the following principle is deduced:—"That adoption by a widow under her husband's authority has the effect of devesting an estate vested in any member of the undivided family, of which the husband was himself a member. But it does not devest the estate of one on whom the inheritance has devolved from a lineal heir of the husband." We do not suppose that *Mr. Justice Telang* in the last case meant to lay down that those members of the undivided family whose estate would be devested should have been in existence at the time of the husband's death. Hence, supposing there were two brothers, one of them dies leaving a widow, a son is subsequently born to the other and that other also dies, an adoption since made to the first brother dying would be valid, notwithstanding the fact that the nephew was not a member of the undivided family at the time of his uncle's death. As regards the second branch of the rule deduced by *Mr. Justice Telang* that it does not devest the estate of one on whom the inheritance has devolved from a lineal heir of the husband, there is some difficulty. We presume that stress is laid on the fact that property should have passed by inheritance from the lineal heir. We have already pointed out that the case of the mother succeeding to the lineal heir of her husband, the son, is treated as an exception. The son himself might have taken the property by survivorship, though he would then be not strictly the lineal *heir*, but a lineal survivor. In the case of a family of father and son having joint property and the son dying first leaving a widow, the father would be the lineal heir in the loose sense in which those words were employed by *Mr. Justice Telang*, and if the property pass from the father to the father's widow, the subsequent adoption by the son's widow would be deemed to fall within the rule against the devesting of an estate vested by inheritance in a lineal heir of the husband. But we

have to ask the question whether there is anything in the decisions of the Privy Council to justify the broad terms in which this rule is laid down. The cases before the Privy Council were generally the cases of the mother-in-law making the adoption after the vesting of the estate in the daughter-in-law; and there is nothing in the language employed by the Privy Council to justify the proposition laid down by *Mr. Justice Telang* in the broad terms he has employed. There are, however, cases of adoption by the daughter-in-law after the estate has vested in the mother-in-law being declared invalid. See *Shri Dharnidhar* v. *Chinto* I. L. R. 20, B., 250. The argument would be the same where instead of the mother-in-law the estate has vested in some other heir, a brother or other collateral of the father-in-law. So also in a recent case decided in Madras, *Ratna Mudaliar Ragunada Bhattar* 8, M. L. J. Rep. 173, where the estate had passed from the father-in-law to his brothers; adoption by the daughter-in-law was held invalid. These decisions would appear to be in conflict with a case in I. L. R., 21 B. 319, where the adoption by the daughter-in-law after the estate had passed from the father-in-law to his brother was held valid. True, their Lordships in that case relied upon the assent of the father-in-law's brother whose estate was devested in support of the validity of the adoption. But in Bombay where a widow is competent to adopt without any authority, the assent of those whose estate would be devested even in cases where the adoption would not fall within the rule of prohibition laid down by the Privy Council would appear to be necessary See *Ramji* v. *Ghaman* I. L. R., 6 B., 498 and *Dinkar* v. *Ganesh Ib.* 505.

The materiality, therefore, of consent is outside the present question which is whether the power of the daughter-in-law to adopt is not exhausted. It appears to us that some important considerations have been lost sight of in the discussion of this question. One passage in the judgment of *Farran,* C. J., in the case of *Babu Anaji* v. *Ratnoji Krishnarau* I. L. R. 21 B. 319, is very suggestive. His Lordship observes at p. 325 : "The adoption when made ensures for the benefit not of the adoptive father alone. It benefits also the immediate ancestors of the adoptive father." In para. 13, S. 1 of the Dattaka Mimamsa, the following occurs:—

"By a man destitute of a son. The word *son* here used is inclusive also of the son's son or grandson, for through these the exclusion from

heaven denounced in such passages as 'Heaven awaits not one destitute of a son' is removed, since it is declared in the text subjoined that the mansions of the happy are attained through the grandson and the other. By a son a man conquers worlds, by a son's son he enjoys immortality, and afterwards by the son of a grandson he reaches the solar abode."

The principle of the above passage is that a grandson is as good as a son, and it follows that the adoption of a grandson has as much efficacy as the adoption of a son. The same rule is also enunciated in the Dattakachandrika. From this, we argue that an adoption by a daughter-in-law is as much an adoption to the last male owner, the father-in-law, as it would be, if her husband was the last male owner; only in the former case the adoption is of a grandson to the last male owner. If the father-in-law had been alive, the adoption would not have been invalid, but would have the effect of preventing an adoption by himself or his empowering his own widow to adopt. We are, therefore, of opinion that it is not right to invalidate an adoption by the daughter-in-law after the inheritance had vested from the father-in-law in another, on the ground that the adoption is not made to the last male-owner. A grandson is adopted to the last male owner, and we see no principle in rejecting that adoption as invalid.

CRITICAL NOTE.

GNANA SAMBANDA PANDARASANNADHI *v.* VELU PANDARAM, I. L. R., 19 M. 243.

The questions that arise are the following:—

(1) Has the plaintiff any claim for the establishment of the exclusive right to the management and for exclusive possession?

(2) Is the plaintiff barred from suing for the recovery of the 2nd defendant's share?

(3) Is he barred from suing for the recovery of his father's half share.?

There is no question in the case, of misappropriation or misapplication of trust property. The suit is one to establish the plaintiff's personal right to the management as against the 1st

defendant, and to recover the properties from him. It is assumed that the plaintiff's family had the hereditary right of trusteeship of the Kattalai. The plaintiff's grandfather was entitled to the trusteeship, with his nephew. The right of the grandfather was descendible to his heirs and so also was the right of the nephew. If the nephew died, *leaving no heirs,* then the grandfather might have, as the sole trustee, the right of exclusive management. If the nephew alienated his right of management to another, although the alienation might be invalid under the decision in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* I. L. R., 1 M., 235, the grandfather would not acquire the right so alienated, but the alienor or his heirs would be stil entitled subject to the Law of Limitations.

In the present case the grandfather died, succeeded by his son. The nephew died, succeeded by the 2nd defendant and his brother since deceased. On behalf of the 2nd defendant and his brother their mother alienated their half right to the trusteeship and their right to joint possession of the properties. We concede that this transfer was invalid. But the invalidity of this alienation only entitled the 2nd defendant and his brother to sue for recovery of the right of joint management and joint possession. The act of the guardian was clearly invalid, and even if it was their own act, it would be invalid according to the decision of the Privy Council in *Puran-Mal* v. *Ali Khan,* I. L. R., 1 M., 235. There would be no estoppel in such a case, for the alienor makes no misrepresentation; nor, if there was misrepresentation, would it raise an estoppel as the representation would relate to a matter of law, namely, the validity of the alienation, and it would be against public policy to defeat the rights of the *cestui que trust* by any estoppel against a trustee. The nephew's sons in this case would be entitled to sue within the statutory period. That the statute would run against a person to defeat the right of management and consequent possession, has been held by the Privy Council in *Balwant Rao Biswant Chandra chor* v. *Purun Mal Chaube* L. R. 10, I. A., p. 90, which has been followed in numerous cases by the High Courts in India. If 2nd defendant's right is barred, the right at the same time is acquired by the person in adverse possession. See *Jagan Nath Das* v. *Birbhadra Das* I. L. R., 18 C., 776, and *Subbaramayyar* v. *Niyamadullah Saheb Ib.*18 M., 342. It is difficult to see how the plaintiff's

father or himself, can acquire the right of the 2nd defendant. If the 2nd defendant has not lost his right, the plaintiff can only be entitled to his half right. If the 2nd defendant has lost his right by operation of the statute, he must have lost it in favour of somebody, and that is the 1st defendant in this case. The plaintiff cannot, therefore, sue to recover more than the joint right of management and joint possession. It is impossible to justify the decree of the High Court giving the plaintiff the sole possession of the properties with the exclusive right of management.

The foregoing discussion naturally leads to the next question, whether the plaintiff in any event would not be barred from recovering the 2nd defendant's share? The High Court observes rightly enough, that "the personal right of trusteeship is not joint, though the rights of trustees against strangers are joint." Here the 2nd defendant's mother alienated on behalf of the 2nd defendant the right to the trusteeship in, September, 1868. And the 1st defendant and his predecessors have held it since then up to the date of suit. We have already shown that the 1st defendant has acquired the right to the trusteeship as against the 2nd defendant, and that the 2nd defendant has lost it. The learned Judges apparently do not dispute this, but they say that plaintiff's father died only in 1884, the plaintiff's right of action accrued then, and 12 years not having elapsed since then, he was entitled to recover. They further observe that although the 2nd defendant's mother alienated in September, 1868, possession did not pass till February, 1869, the date of the plaintiff's father's alienation. Assuming this to be correct for the purpose of argument, we are unable to see what follows from this. Unless it can be said that the plaintiff's father should be regarded as the alienor in respect of the 2nd defendant's share also, there is nothing in the fact that 1st defendant's predecessor took possession in February, 1869. The 1st defendant's predecessor did not hold possession of the 2nd defendant's half share under any claim from the plaintiff's father, or under any title derived from him. It is, therefore, absurd to suggest that in so far as the 2nd defendant's share is concerned, there was any act of plaintiff's father in fraud of the trust. The possession, therefore, by the 1st defendant's predecessor of the 2nd defendant's share, whether it commenced in September, 1868

or in February, 1869, was adverse to plaintiff's father and (assuming that he had a right to sue for the recovery of that half share, which we have already shown he had not, the next day after 2nd defendant's mother's alienation he could have sued for it,) he would be barred by the lapse of 12 years from the date when the adverse possession commenced.

The plaintiff would be in no better position than his father, for whatever would be adverse to him would be adverse to the plaintiff also.

It is an established rule of law that where possession is adverse to a trustee it is adverse to his successor also, and that if the predecessor is barred, the successor is also barred. Whether in the case of an alienation by an immediate predecessor if he is barred by the statute, the successor will also be barred, is a question which we will consider under the next head. But there can be no question that where a stranger holds not under a title derived from the preceding trustee but adversely to him, for example as a trespasser, the successor is barred as well as the predecessor by the operation of the statute. The principle is the same as that involved in cases where the owner of a limited estate, whether a Hindu widow or a Vatandar or a Ghatwal, capable of representing the inheritance, is affected by the adverse possession of a stranger, so as to defeat the right of the reversioner or the succeeding holder of the estate. The principle was fully expounded in a Full Bench decision of the Calcutta High Court by *Sir Barnes Peacock* in *Nobin Chunder* v. *Isvarchander*, 9 W. R., 505 and it has been followed in numerous cases.

The same principle has been expounded in a masterly judgment by Justice *West* in *Radhabai* v. *Anantrav Bhagvant Deshpande* I. L. R., 9 B., 198, 211 212, 224, 225 and 231. The principle of these decisions has received the approval of the Privy Council in *Aumirtolall Bose* v. *Rajoneekant Mitter*, I. L. R., 2 I. A., 113. It may be in cases where the holder of the limited estate does not represent the inheritance, the reversioner or succeeding holder is only barred by adverse possession for 12 years after his right accrued. It has been held in England that the bar of the tenant-for-life does not extinguish the right of the remainder-man. But ad-

verse possession against a tenant-in-tail, who fully represents the inheritance because he can bar the entail, bars the remainder-man-in-tail. See *Tolson* v. *Kaye,* 3 Brod. and Bingh., 217.

In the case of trusts or other offices incapable of alienation, although the estate of a particular holder is limited, and the successor takes *per formam doni,* a decree against one binds the successors. *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* 2 M. I. A., 392; *Prosunno* Kumari *Debya* v. *Golabchand Baboo* L. R., 2 I. A. 150; *Smith* v. *Lord Brownlow,* 9 Eq. 241; *Philipps* v. *Hudson,* 2 Ch. Ap. 243.

That a right to the trusteeship joint with other people who are lawful trustees, can be acquired by adverse possession goes without saying. There is abundant authority for saying that a limited interest is capable of acquisition by adverse possession—Vide *Madhava* v. *Narayana* I. L. R., 9 M., 244; *Sankaran* v. *Periasami* I. L. R. 13 M., 467. In the case of trusteeship itself it was held by the High Court of Madras in *Nilakandan* v. *Padmanabha* I. L. R., 14 M., 153, affirmed by the Privy Council upon another point *Nilakandhen Nambudirapad* v. *Padmanabha Revi Varma* I. L. R., 18 M., 1, that one could become a joint trustee with others lawfully entitled to trusteeship by mere adverse enjoyment of joint right. Therefore, if plaintiff's father had not alienated his half share, but had continued in joint enjoyment and joint management with 1st defendant's predecessors, 1st defendant would by the Statute have acquired a right to joint management with him, and, therefore, with plaintiff also. The fact that plaintiff's father has also subsequent to 2nd defendant's mother's alienation, alienated his own share, does not prevent the 1st defendant's possession being adverse.

Looked at from any point of view, the point seems to be clear that as regards the 2nd defendant's share in the management, the 1st defendant has acquired a valid right by the operation of the Statute, and plaintiff's right of action, if any, has become barred.

We proceed further and contend that even as regards plaintiff's father's share, plaintiff's right of action is gone. In a case of the alienation of the office of trustee, the alienation is altogether invalid, *Rajah Varmah Valia* v. *Ravi Varmah Kunhi Kutty* I. L. R. I. M., 235. Unlike an alienation by a Hindu widow or a

Vatandar or Ghatwal holder which, although it may purport to be absolute, is good for the lifetime of the holder, the alienor is at once entitled to recover what has been alienated on the ground of the utter invalidity of the alienation. The cases, therefore, in which the reversioner or successor has been held entitled to recover within 12 years of the accrual of his right, have no bearing on the question.

The High Court relies on the decisions referred to below. As regards the decision in *Mahomed* v. *Ganapati* I. L. R., 13 M., 277, the lands were the emoluments of an office, and the holder for the time being could validly alienate them during his life. During the lifetime of the alienor, therefore, there was no possession in the alienee adverse to the successor. The moment the succession opened, and the plaintiff's right to sue accrued, the possession became adverse. Before the lapse of 12 years the suit was instituted, and the plaintiff was held entitled to recover. As regards the decision in *Modho Kooery* v. *Tekait Ram Chunder Singh* I. L. R., 9 C., 411, it was held that the plaintiff there was actually barred, 12 years having elapsed from the date on which the right accrued. It cannot be said that if the period had not elapsed, the Court would necessarily have held that the plaintiff's right of action had subsisted. It was unnecessary for the Court to decide the question, and any opinion expressed cannot have weight. As regards the decision in *Jamal Saheb* v. *Murgaya Swami* I. L. R., 10 B. 34, it appears to have been assumed that the alienation was valid during the alienor's lifetime. The plaintiff being next in succession, there can be no doubt that he was entitled to sue for the recovery of the property within 12 years from the date of his predecessor's death.

As a trustee is entitled to sue for the recovery of that which he has alienated the very next moment after the alienation, the possession of the office by the alienee at once becomes adverse, and it is on this ground that after the lapse of the period the alienor is held disentitled to recover, and not because he has parted with his right. Moreover, the *cestui que trust* who are entitled to proper trustees, are from the moment of the alienation entitled to sue to recover the properties from the alienee on the ground that he is not the lawful trustee. Section 10 of the Limitation Act will not have any application to cases where the suit is merely to recover the trusteeship

Limitation, therefore, must run by reason of the adverse possesion both against the alienating trustee and his successors.

The article of the Limitation Act which would apply to the case is Art. 124 or 144. Whichever article applies, the 3rd column makes use of the words "defendant" and "plaintiff". Section 3 of the Act defines "plaintiff" as including "any person from or through whom the plaintiff derives his right to sue," and the word "defendant" as including "any person from or through whom the defendant derives his liability to be sued." It has been held, however, that a reversioner, although he does not derive his title from the widow is yet sufficiently represented by the widow to justify the statement that he claims from or through the widow. And a Hindu son, who is jointly entitled with the father, is also loosely said to claim through the father. This definition has not been held to preclude the possession against the father or the widow being held to be adverse to the son or the reversioner. The plaintiff would include his predecessors in office and the 1st defendant, likewise his predecessors.

The trustee for the time being represents the estate and the right of the successor does not come into being before the death of the predecessor, or merely by reason of the alienation. Notwithstanding, therefore, the alienation, the right of the alienor lawfully subsists, for he would be entitled to sue for recovery the next moment. And the principle that what is adverse to one trustee is adverse to the successor, and when the predecessor is barred the successor is likewise barred is applicable. It is possible to contend, however, that the aliention of the trusteeship is in fraud of the successor, and it should not be competent to the fraudulent alienor by allowing the statute to elapse, to bar the right of the successor, for, that will be taking advantage of one's own wrong.

It may be said that if the trustee for the time being alienates the office, and the alienee is in possession, he thereby renders himself less capable of representing his successors, or of protecting their right by a hostile action against such alienee. But he no more fails to represent his successors than in cases of adverse possession beginning in trespass, the trustee for the time being, who is lukewarm or indifferent to the interests of the trust fails to represent it or to bar the right of the successors by allowing the statute to run against himself. There is no legal impediment to the alienating trustee

suing to recover the office from the alienee, and he is as fully clothed with all rights appertaining to the office as any of his successors. It, therefore, follows that whether the possession of the office by a stranger was derived from the lawful trustee or had a hostile origin, the successor is barred when the alienor is barred. As observed in *Nilmony Singh* v. *Jagabandhu Roy* I. L. R., 23 C., 545, "each succeeding manager or trustee does not get a fresh start as far as the question of limitation is concerned upon the ground of his deriving title from the former manager." In that case 12 years had not elapsed from the time that the plaintiff's right accrued, but the period having run against the predecessor who made the invalid alienation, the plaintiff was held barred.

TRANSLATED FROM THE MADANA PARIJATA.

CHAPTER VIII.

Partition of heritage.

As divided coparceners only are entitled to perform *sraddha* separately, partition of heritage is described after the chapter on *sraddha*.

Here Narada says :—"That department of law which treats of the division of the paternal wealth by the sons is called by the wise *Dayabhaga* or partition of heritage."[1] *Commentary* :—The word *paternal* is illustratively used of the grandfather. The word *tat* is an adjective qualifying the noun through the verb.

There are four periods for partition. One is when even though the father be alive he desires partition. Another period is when the sons desire it though the father be unwilling, provided the mother is past menstruation and the father does not like the face of women and is not desirous of wealth. Another is when the sons desire it and the father is old, addicted to vice and affliction with incurable diseases though the mother is not past menstruation and the father is unwilling The other is when the father is dead. Of these Yajnavalkya states the first case thus : "If the father makes a partition, he may divide his sons according to his pleasure. He may give the eldest the best share or make all equal shares."[2]

(1) Narada, XIII, 1. (2) Yajnavalkya II, 114.

And partition among the eldest, &c., is thus shewn by Manu:—"The deduction in favor of the eldest is a twentieth part and the most excellent chattel of all; a half of that to the middlemost and a fourth of that to the youngest."[1] *Commentary.* The meaning of this text is:—A twentieth part of the partible wealth and what is most excellent of all the partible chattels should be given to the eldest. A fortieth part and one middling chattel to the middlemost and an eightieth part and the worst of all the chattels to the youngest. They should equally divide and take the wealth that is left after these deductions are made. There are many other similar texts of Gautama and others laying down an unequal division. They are not quoted here for fear of swelling the book. Though unequal division is thus established by the Shasters, still as it is abhorred by the world, this mode of division is not enjoined to be practised on account of the text which says: "That which does not lead to heaven and is abhorred by the world, one should not practice though it is a virtue."[2] The Smriti says:—"Just as the practice of Niyoga and the slaying of a barren cow are not now allowed, so partition with deductions is not now found."[3]

If, however, the father by chance makes an unequal partition it does not become void; so says Yajnavalkya. "A legal distribution made by the father among sons separated with greater or less shares is pronounced valid."[4] *Commentary*:—If legal, *i.e.*, not divorced from law, then it cannot be annulled. This is the meaning. It is in effect said that if it is illegal, it becomes void.

Accordingly Narada also says:—"A father who acts contrary to law has no power in the distribution of wealth."[5]

But where there is no abhorrence of the world to an unequal division, there unequal division certainly takes place as Narada says "A father making a partition may take two shares for himself."[6] *Commentary*:—This also applies to the person making a self acquisition.

So Vasishtha says:—"But he among them who acquires wealth himself shall take only two shares."[7] Among them, *i.e.*, among those entitled to share, the paternal uncles, &c.

(1) Manu, IX. III. (4) Yajnavalkya II, 116.
(2) Anonymous. (5) Narada XIII. 16.
(3) Anonymous. (6) Narada XIII. 12.
(7) Vasishtha XVII. 51.

Narada after saying "They shall divide the wealth equally," states the second case thus: "When the mother's menstruation has ceased and the sisters have been married and when the father has turned away from sexual enjoyment and his desires have ceased"[1] *Commentary* :—*Prattásu*] married. *Ramanam*] sexual enjoyment. The meaning is "when his desire for sexual enjoyment has ceased"; [desires] regarding wealth. Sankha states the third case thus :— "When the father is unwilling, partition may take place if he be old, perverse in mind and afflicted with disease."[2] *Commentary* :—Perverse in mind] addicted to vice. Yajnavalkya states the fourth case thus :—"After the parents let the sons divide the wealth and the debts equally."[3] *Commentary* :—After parents] after the death of the father and mother. The wealth, &c.,] The meaning is that they shall divide the paternal wealth and debts equally.

The same author states a distinction when the sons themselves make a partition after the father's death or during his life when he is subject to the taint of degradation, &c. "The uninitiated must be initiated by those already initiated, as also the sisters by giving them a fourth part of their own shares."[4] The meaning is that partition should after initiating uninitiated brothers and sisters, *i.e.*, performing their sacraments up to marriage inclusive. The meaning of "As also, &c.," is that the unmarried sisters should be married and should be given a fourth share of their own respective shares. By their shares is meant "the shares which the sons of the various castes would be entitled to. Under the subsequent text they shall have from three, two and one shares, etc." The following is the mode of division :—A Bramhin has one wife, a son and a daughter by her. Here the father's wealth should be divided into two shares, one of these shares should be divided into four parts. After giving the daughter a fourth part, the son shall take the rest. When there are two sons and one daughter, then, the father's wealth should be divided into three shares, one of these shares should be divided into four shares. Having given a fourth share to the daughter, the sons shall equally divide and take the rest. The same should be inferred when there are more than two sons and two daughters. If there be one son and two daughters, then the father's wealth should be divided into three

(1) Narada XIII, 3.
(2) II. Cole. Dig.
(3) Yajnavalkya II. 117.
(4) Ibid, II. 124.

shares. One of these shares should be divided into four parts. Having given each of the daughter a fourth part, the son shall take all the rest. This should be the rule of division adopted where there are sisters and brothers of the same caste unequal in number. The following rule should be applied where there are brothers and sisters of different castes equal or unequal in number. Thus when a Brahmin has wives of all the castes, Brahmin, &c, and his Brahmin, Kshatriya, Vaisya and Sudra wives have each a son and daughter and where the Brahmin has thus eight children, four male and four female then the issue of the Brahmini wife take eight shares, the issue of the Kshatriya wife six shares, the issue of the Vaisya wife four shares and the issue of the Sudra two shares. Thus having divided the whole wealth into twenty shares the daughter of the Brahmini should be given a fourth part of the four shares which represent the share of a son of her caste. To the daughter of the Kshatriya should be given a fourth part of the three shares which represent the share of a son of her caste. To the daughter of the Vaisya should be given a fourth part of the two shares which represent the share of a son of her caste. To the daughter of the Sudra wife should be given a fourth part of the one share which represents the share of a son of her caste. Having thus given, the sons of the Brahmini, the Kshatriya, the Vaisya and the Sudra wives should put together the rest of the wealth and divide and take it in four, three, two and one shares respectively. Where the brothers and sisters are unequal in number, then having divided the whole wealth into as many shares as there are brothers and sisters according to the rule "they shall take four, three, two and one shares respectively," the sisters should be given a fourth part of the share due to a son of her caste. Having so given, the remaining shares should be put together and should be divided among the sons in four, three, two and one shares respectively. The rule should thus be understood. Some, however, think thus: Having given the maiden daughters a fourth share according to the rule above laid down, their marriage must be performed with such wealth alone. It is not that they should be married out of the common wealth and that they should be, subsequently, given a fourth share. This opinion should be rejected as Medhatithi, the author of the Mitakshara, and others do not incline to that view. Or the question may be [determined with reference to the practice

in different countries. The periods of partition and what arose in that connexion, these both have been described. Now primary and secondary sons are described in order to show the rule of succession to the heritage.

On this point Yajnavalkya says:—"The legitimate son (*aurasa*) is one procreated on the lawful wedded wife. Equal to him is the son of an appointed daughter; the son of the wife is one begotten on wife by a kinsman of her husband or by some other. One secretly produced in the house is the son of hidden origin. A damsel's child is one born of an unmarried woman. He is considered as son of his maternal grandsire. A child begotton on a woman whose first marriage has not been consummated or on one who had been deflowered before marriage is called the son of a twice married woman. He whom his father or his mother give for adoption shall be considered as a son given. A son bought is one who was sold by his father and mother. A son made is one adopted by the man himself. One who gives himself is self given. A child accepted while yet in the womb is one secured with a bride. He who is taken for adoption having been forsaken by his parents is a deserted son. Of these the next in order in the absence of all the preceding is heir and giver of the pinda. This rule is stated in respect of sons equal in caste."[1]

Commentary:—The virtuous wife is one belonging to the same caste and married in legal form. The son born of her is *aurasa* He is primary. So also the son begotten on a wife of the same caste married in the Asura and the succeding forms, so the Murdhavasikta, Ambastha, and the Parasava the same as Nishada, sons begotten by a Bramhin on his wives in the order of castes, such as the Kshatriya, &c, the Mahishya and Ugra, sons begotten by a Kshatriya on the wives of the Vaisya and Sudra castes, the Karana son begotten by a Vaisya on a Sudra wife, all these are certainly *Aurasas*. *Putrikasutah*] Either the appointed daughter herself regarded as a son or the son of the appointed daughter. Either way the *Putrikasuta* is equal to him *i.e.*, the *Aurasa*. So the *Dvyamushyayana* (the son of two fathers) is the *aurasa* son of his procreator. The *Kshetraja* (son of the wife) is one begotten on the wife under the Niyoga rules by one of the same caste or *gotra*

(1) Yajnavalkya, II, 128—3.

sapinda or her husband's younger brother. The *Gudhaja* or son of hidden origin is one begotten in secret on a woman by some unascertained person of the same caste in her husband's house. By some unascertained person] This is from the stand point of the husband, not of the wife. The knowledge of the person belonging to the same caste is possible because the fact of it is known through the wife. Where owing to sexual intercourse with a man under compulsion or in secret even she does not know his caste, the son born of it bears only the name of *Gudhaja* but does not attain the status of the *Gudhaja* previously described. The son begotten on a maiden by a man of the same caste is called the damsel's son. He is the son of his maternal grandsire if she is unmarried and stays under her father's roof. If she has been married, the son then belongs to her husband.

Accordingly, Manu says:—"That son whom a maiden in her father's home begets in secret, let one call him the damsel's son by name, belonging to the damsel's husband."[1] *Commentary*:— Because the word *husband* is used, it should be understood that the son belongs to the husband if she has been married and to the maternal grandsire otherwise. The twice married woman is of two sorts—the virgin and the deflowered. One begotten on her by a man of the same caste is called *Punarbhava*. The *Dattaka* is also of the same caste; for Manu says: "He whom his father or mother gives during distress and with water, being of the same caste and affectionately disposed should be known as the son given."[2] *Sadrisam*] of the same caste. Mother has power to give only in distress when the husband is dead or is absent. Similarly, the father has power only in distress when the mother is dead or is subject to lunacy, &c. Or, both have power only when acting together. As the expression "in distress" is used, it is inferred that in the absence of distress, the son should not be given. If given in the absence of distress, sin attaches to the giver and not to the receiver.

An only son should not be given or taken. So Vasishtha says "But let not one give or take an only son."[3]

Similarly, the eldest son also should not be given.

(1) Manu, IX, 170. (2) Ibid., IX, 168.
(3) Vasishtha, XV, 3.

Vasishtha thus lays down the manner of taking a son: "One desirous to adopt a son, should convene his kindred, inform the king, perform the *homa* with *vyahritis,* in the middle of his dwelling, and shall only take one whose relatives are not far off and who is nearest among his relatives."[1] *Nivesanasya*] of his dwelling. The expression "whose relatives are not far off" is used for the purpose of prohibiting the taking of one who is very much removed by country and language. This rule should be applied *mutatis mutandis* to the son bought, to the son self-given and to the son made. The son bought is one of the same caste not being an only or the eldest son sold in distress by his father and mother together as previously laid down or by either of them. As for what has been stated by Manu: "He is the son bought whether equal or unequal,"[2] that is intended to mean equal or unequal by good qualities and not by caste, such as Brahmin, &c. The son made is one who is taken for a son by one anxious to have a son, he being devoid of parents and induced to become his son by show of wealth, &c. The son self-given is one who being either devoid of parents or forsaken by them seeks one and exclaims: "I shall become thy son." Here also he must be of the same caste. The son received with a pregnant bride is one born of the pregnancy of a woman married while pregnant, if the pregnancy was due to a male of the same caste. One who being forsaken by his father and mother is taken for a son by a person of the same caste is called a deserted son. Here the author shows the order of succession by the following portion of the text. "He is the giver of the *pinda* and taker of the wealth, &c." The author next says that this applies to sons of the same caste (with the father) by the following portion of the text: "This rule has been stated by me in respect of sons of equal caste." Though the sons of the wife, &c., may have been begotten by males of a superior caste still they retain their appropriate name; but do not attain to the rank of sons begotten by males of the same caste because the clause "This has been stated in respect of sons of equal caste" has a restrictive force. If begotten by men of inferior caste it should be distinctly understood that they are contemptible, being born in the inverse order (*Pratilomaja*). The damsel's son, the son of concealed birth, the son received with the pregnant bride, and the son of the twice-married woman are said to be of the same caste

(1) Ibid, XV, 6. (2) Manu, IX, 174.

through their procreator's and not by their own nature; for, they being sons of unchaste wife and widow are themselves excluded from the pale of caste.

If after the making of an appointed daughter an *aurasa* son is born, then Manu states a distinction. "If subsequent to the making of an appointed daughter a son is born, division in that case shall be equal; for women have no right of primogeniture."[1]

Katyayana says: "If an *aurasa* is born the other sons take a fourth share if of the same caste; but if of different caste they get only food and raiment."[2] Of equal caste] the son of the wife, the adopted son, the son bought, the son made, the son self-given, and the deserted son. Of different caste] the damsel's son, the son of concealed birth, the son received with the pregnant bride and the son of the twice-married woman.

As for the text of Vishnu: "But the damsel's son, the son of concealed birth, the son received with the pregnant bride, the son of the twice-married woman, all these are contemptible and do never obtain share of the father's wealth, "[3] that is intended to prohibit the taking of a fourth share by these where there is an *aurasa* son. In default of the *aurasa* son, &c., even the damsel's son, &c., certainly take the whole of the father's wealth according to the text. "The next in order in default of the preceding." This is Vijnanesvara's view. This order of succession laid down by us here is also laid down in the Dayabhaga chapter of the Subodhini a commentary on Vijnanesvara's work.

Regarding one who being entitled to a share does not wish to take it either from lack of avarice, &c., or from ability to earn for himself, Yajnavalkya says: "One who is able (to earn) and not desirous (for partition') should be separated by giving him some trifle."[4] Something however valueless should be given and partition should be made; and this is enjoined in order that his sons, &c., may not subsequently claim a partition.

In respect of the *Dvyamushyayana* (the son of two fathers) the author lays down a special rule. "The son begotten under the Niyoga rules by a sonless man on the wife of another is legally

(1) Ibid, IX, 134.
(2) II, Cole. Dig.
(3) Not found.
(4) Yajnavalkya II, 116.

the taker of the wealth of both and the giver of the *pinda*."[1] When the owner of the seed being himself sonless enters at the time of supplying the seed into the special contract 'the son born hereof shall belong to us both,'—it is only then that the son takes the wealth of the owners of both the seed and the soil. In the absence of a special contract, he takes the wealth only of the owner of the soil.

Regarding the son born subsequently to partition, Manu says :— "But the son born after partition takes only the paternal wealth."[2] The word *pitryam* is an *ekasesha* compound and means '*belonging to the father and the mother*.' Accordingly, it is also said :—" What is acquired by the father himself after division with his sons all that belongs to the son born after partition and the sons, born before it are declared powerless over such wealth."[3] It is also said : " Or let him divide equally with those who may have been re-united with him (father)."[4] The meaning is, that the son born subsequent to partition shall share equally with others who after partition were reunited with the father.

On the question how share should be allotted by the other brothers to the son born subsequent to partition of the mother or the brother's widow whose pregnancy was not manifest at the time of the partition, Yajnavalkya says : " His share should be allotted out of the visible wealth corrected for income and expenditure."[5] '*Tadvibhaga*'] his share. Here 'his' refers to the son born after partition in the manner previously stated. '*Drisyadva*' the particle '*va*' here is used for the purpose of emphasis and means, '*certainly*.' Of what visible wealth ?] Of the visible wealth corrected for income and expenditure. Income is gain derived from agriculture, &c., in respect of their shares obtained at the partition. Expenditure is what is incurred of necessity to discharge the father's debts, to maintain the family, &c. Having added the share and income and subtracting from it the expenditure incurred, the brothers should each give out of their own wealth, portions in fair proportion, to the son born after partition so as to make his share equal to their own. This is the meaning. If the pregnancy of the mother or the brother's widow be manifest, partition should

(1) Anonymous.
(2) Manu, IX, 216.
(3) Brihaspati. YXX, 19.
(4) Manu, IX, 216.
(5) Yajnavalkya, II, 122.

be made after their confinement. For, Vasishtha says:—"Now partition among brothers to await till childless women beget sons."[1] The meaning is, that partition should be made after confinement of childless women whose pregnancy is manifest.

When ornaments, &c., are given by the father or the mother after partition to the divided son, the son born after partition should not prohibit it. Accordingly, the holy sage says: "Whatever is given to any of the sons by the parents becomes his exclusive wealth."[2] Whatever is given by the parents to any of the sons before partition also becomes his exclusive wealth by parity of reasoning. Hence, when anything is given to one, none other should prohibit it.

Next, partition among sons unequal in caste. Here Yajnavalkya says:—"The sons of a Brahmin in the order of castes shall take four, three, two and one shares; the sons of a Kshatriya, three, two, and one shares; the sons of a Vaisya two and one shares."[3] In the order of castes the sons of a Brahmin begotten on wives of Brahmin, Kshatriya, Vaisya and Sudra castes, respectively, shall take four, three, two and one shares. The son of the Brahmini wife takes four times the share of a Sudra; The son of the Kshatriya wife takes three shares because he is inferior to the Brahmini's son by a fourth; the son of a Vaisya wife takes two shares as he is inferior to a Brahmini's son by a half; the son of a Sudra wife takes a share. The sons of a Kshatriya begotten on wives of the Kshatriya, Vaisya and Sudra castes, respectively, take three, two and one shares. The son of a Kshatriya begotten on a Kshatriya wife takes three shares because he is a degree inferior to the son begotten by a Brahmin on a Brahmini wife; the son of a Kshatriya begotten on a Vaisya wife two; and the son begotten on a Sudra wife takes one. *Vidjas*]. sons begotten by a Vaisya on his wives of the Vaisya and Sudra caste. The plural number in *Vidjas* has reference to the possible plurality of the sons and not to the plurality of the husbands of the wife. The son of a Vaisya begotten on a Vaisya wife takes two shares, because he is inferior to the son of a Brahmin begotten on a Brahmini wife by a half, and the son begotten by a Vaisya on a Sudra wife takes one share. In this manner, the

(6) Vasishtha, XVII, 41. (7) Not found.

(8) Yajnavalkya, II, 125.

rule should be applied whether the sons be equal or unequal in number.

The sons of a Brahmin begotten on his wives of the Kshatriya and other castes shall not take land acquired by acceptance of gift. So the Sastra says :—" Land acquired by acceptance of gift shall not be given to the sons of the wife of Kshatriya and other castes. Even if the father give it to them, the son of the Brahmini may resume it when he is dead."[1] As the word "Acceptance of gift" (Pratigraha) is used they take land acquired by purchase, &c. So " the son begotten by a twice-born on a Sudra wife does not take a share in land." The meaning is, that the son of a Sudra wife begotten by any of the twice-born do not take shares in land acquired by acceptance of gift, purchase, &c. As for this other text which prohibits the giving of any share to the son by a Sudra wife, viz.: " The son by a Sudra wife does not share in the wealth of the Brahmin, Kshatriya and Vaisya. Whatever his father may give him, that alone shall be his wealth." This is intended to lay down that no share shall be allotted at a partition to the son by a Sudra wife where his father, during his lifetime, had given him something. But where nothing had been given by the father, his right to share certainly subsists.

Yajnavalkya lays down a special rule in the case of the son begotten by a Sudra on a female slave. " Even the son begotten by a Sudra on a female slave shall obtain a share at the father's choice. But when the father is dead let his brothers make him the partaker of half a share. If brotherless he takes the whole in default of the daughter's son."[2] *Kam-atah*] at the father's choice, he may take a share. That is, he has a share if the father give him one. The drift is, that the sons by married wives shall give him a half of their share. If brotherless, *i.e.*, having no brother born of a married wife, he shall take the whole paternal wealth if there are no daughters of married wives or their sons. If there be, the son of the female slave gets only a half share. Since the Sudra is specially named the conclusion is that sons begotten by a twice-born on the female slave do not in any manner obtain shares but are entitled only to food and raiment.

S. SITARAMA SASTRI.

(1) Brihaspati, XXV, 30. (2) Yajnavalkya, II, 133 and 134.

NOTES OF INDIAN CASES.

Ittappan v. Parangodan Nayar, I. L. R., 21 M., 291. The defendant had a contract of renewal of a mortgage and continued in possession having paid the renewal fee. But no fresh demise had been executed. Upon the jenmi suing to eject, the Court dismissed the plaintiff's claim. Without a registered instrument defendant could not acquire the mortgage right. But he had a contract entitling him to the document, and although the legal estate had not passed to the defendant in the absence of a document, he was entitled in equity to resist the plaintiff's claim for possession. It appears to us that the dictum in *Papireddi* v. *Narasareddi* I.L.R., 16 M., 464, has been rightly dissented from.

Balwant Singh v. Rani Kishori, I.L.R., 20 A. 267. Our readers may remember the question that was raised before the Allahabad High Court of the validity of the appointment of Mr. Justice *Burkitt.* He was appointed by the Local Government whose power is restricted to provisional appointments *upon* the happening of a vacancy. The appointment in his case was made many years after the vacancy had occurred. The Allahabad Court was of opinion that the appointment could not fall within the wording of the Letters Patent, but they refused to consider it invalid, because there might be some authority unknown to the Judges which might render it valid. The Privy Council have now expressed their opinion that there is no limit of time within which the Local Government was bound to make the appointment. Whether this interpretation is justified by the language or not, it is undoubtedly a more satisfactory conclusion than that of the Allahabad High Court. Though the decision in *Queen-Empress* v. *Gunga Ram* I. L. R., 16 A. 136 was referred to in the course of the argument, the judgment of the Judicial Committee makes no reference to it.

Kamrak v. Sundar Nath, I.L.R., 20 A. 299. There can be no doubt that upon an application to sue *in formâ pauperis,* the Court is competent to determine whether the allegations made show a right to sue. Clause *c.* of S. 407 no doubt adds "in such Court." We do not think stress should be laid on those words. It is not competent, however, to the Court to enquire whether the allegations are true. Such an enquiry would involve the determination of the suit itself upon the merits. The cases of *Vijendra Tirtha Sami* v. *Sudhindra Tirtha Sami,* I.L.R., 19 M., 197 and *Chattarpal Singh* v. *Raja Ram, Ib.* 7 A., 661, entirely support the conclusion of the Court. In the case under notice some vague allegations of a claim under law and custom were made

which, upon the examination of the party, turned out to be insufficient to constitute a cause of action.

Chunni Lal v. Harnam Das, I. L. R., 20 A., 302. An application for sale of property in execution of a mortgage decree is held to fall within Art. 179 of the Limitation Act. The Calcutta Court has held the view, see *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar*, I.L.R., 16 C., 246 and *Ajudhia Pershad* v. *Baldeo Singh* I.L.R., 21 C., 818, that it is competent to the decree-holder to apply for an order absolute at any time. This would seem to be the proper view under the Transfer of Property Act. If it is regarded as an application for execution, the view ennunciated in the case under notice, following *Oudh Behari* v. *Nageshar* 13 A., 278, would appear to be correct. In the absence of any provision of the Transfer of Property Act, there can be no doubt as to what view should be taken, as in the case of every other conditional decree the application would be one for execution. We do not think this has been altered by the language of the Act. The Act, no doubt, requires that an order absolute should be obtained; but there is nothing in the Act to prevent its being regarded as in execution of the decree. See also *Elayadath* v. *Krishna* I.L.R., 13 M., 267.

Daya Kishan v. Nanhi Begam, I. L, R., 21 A., 304. There is no doubt, as laid down in this case, that an application under S. 206 to bring the decree into conformity with the judgment is not one to take a step in aid of execution and, therefore, cannot extend the period of limitation. But if execution is applied for as regards that portion which is amended, we should then imagine that the time would run from the date of the amendment, that is to say, time runs from the date when the right to apply accrues. We recognize a difficulty in applying Art. 178 to cases of execution, but no other course is apparently possible. See *Muhammad Suleman Khan* v. *Muhammad Yar Khan* I.L.R., 17 A., 39.

Sha Muhammad Khan v. Hanwant Singh, I. L. R., 21 A., 311. In the case of partition suits, there are generally two decrees, one the preliminary decree, and the other the final one. It has been held, and we think, rightly, that an application to determine the amount of mesne profits is not one in execution, but one which may be made at any time after the passing of the first decree directing the determination of the amount of mesne profits in execution. See *Dildar Hossein* v. *Mujeedunnisa* I. L. R., 4 C., 629 and *Puran Chand* v. *Roy Radha Kishen Ib.* 19 C., 132. On the analogy of these decisions it would seem to be right to hold as in *Dwarka Nath Misser* v. *Baimdra Nath Misser* I.L.R., 22 C., 425, that where a preliminary decree is passed declaring the shares of the respec-

tive parties, an application for delivery after division by metes and bounds is not one for execution. An interlocutory decree for partition is no doubt final for the purposes of an appeal, see *Dulhin Golab Koer* v. *Radha Dulari Koer Ib.* 19 C., 463, but that finality does not preclude the application for division and delivery being regarded as one for the passing of a further decree. *Nasarat-ullah* v. *Mujib-ullah* I.L.R., 13 A., 309. See, however, *Jamsang Devabhai* v. *Goyabhai Kikabhai Ib.* 16 B., 408.

Haji Syed Muhammad *v.* Gulab Rai, I. L. R., 21 A. 345. It appears to us doubtful whether the decision in this case is correct. The facts of this case are somewhat peculiar. By a previous decree between the parties the defendant's right to build upon the land had been negatived. But in contravention of this direction the defendant built and the plaintiff objected and brought a suit for a mandatory injunction two years after the building was complete. There was no acquiescence in the case disentitling the plaintiff to the relief asked for. But the learned Judge, on the analogy of the case in *Benode Coomaree Dosse* v. *Soudamininey Dosse*, I.L.R., 16 C., 252, which was a case of the erection of a building upon one's own land in violation of an easement of light and air, holds that the plaintiff was not entitled to the injunction as he came in late. It appears to us that the analogy is not sound.

In the Calcutta case there was an undoubted right to build, and the question merely was whether the building amounted to an interference with the easement. The principle upon which mandatory injunctions are granted in such cases being that the existence of the building is detrimental to the comfortable occupation of the dominant premises, inaction for a considerable period is taken to be evidence that removal of the building is not a necessary relief, but damages would be adequate compensation. But where there is no right to build at all, it appears to us that the analogy fails.

Thaku Prasad *v.* Gaya Sahu, I.L.R., 21 A. 349. A judgment-debtor made a lease of property against which there was a mortgage-decree for sale. Whether the provision of S. 52 of the Transfer of Property Act applied in terms or not, there can be no doubt that the alienation is void as against a decree-holder's rights under his decree. S. 276 of the Code provides against the validity of alienations of attached property and S. 52 against property which is the subject of a contentious proceeding. The same principle applies to the case under notice.

SUMMARY OF RECENT CASES.

Criminal Procedure Code (1882), *S.* 386—*Fine—Realization of fine by sale of property belonging to a person other than the convict—Suit by owner of the property sold against the Government—Liability of Government —Regulation No. XI of* 1882, *S.* 38—*Regulation III of* 1793, *S.* 1—*Act No. XVIII of* 1850, *S.* 1—*Statute* 21 *and* 22 *Vic., Chap. CVI, S.* 65—*Statute* 23 *and* 24 *Vic., Chap. XXXIV.*

The Secretary of State for India *v.* Sukhdeo.

A was sentenced, on conviction of an offence under the Indian Penal Code, to pay a fine. Proceedings under S. 386 of the Code of Criminal Procedure (1882) were taken to realize the fine inflicted on A, and certain movable property, supposed to belong to A, was sold for the sum of Rs. 5-15-6. The property thus sold really belonged to B, A's father, who thereupon filed a suit against the Secretary of State for India in Council, praying for the restoration of the said property, or for the recovery of Rs. 10, its alleged value.

Held by *Blair*, J.—That the order of the Magistrate for the sale of particular chattels, made under the circumstances of this case, was not a judicial proceeding within the meaning of Act No. X of 1882, and was not the proper subject of criminal revision; that the remedy of an aggrieved third party was by suit; that such a suit would not lie against the Magistrate, but could be maintained against the person in whose possession the goods were found; but that no such suit would lie against the Government, the Government not being primarily liable for a wrongful act done by an officer of the Government, not in obedience to its commands, but in the intended performance of the duties cast upon him by law, and no ratification of the act of the Magistrate in the present instance being proved, even if, under the circumstances, the Government could in law ratify the act so as to make itself responsible. *Bukhooree Singh* v. *The Government* (8 W. R., C. R., 207); *Kedernath Mookerjee* v. *Parbutty Peishkar* (2 W. R, C. R., 267), *The Queen* v. *Chumroo Roy* (7 W. R., Cr. R., 35), *In re Chunder Bhon Singh* (17 W. R., Cr. R., 10) ; *Queen-Empress* v. *Sheodihal Rai* (I. L. R., 6 A., 487); *Forester* v. *The Secretary of State for India in Council* (12 B. L. R., 120); *Raja Saligram* v. *The Secretary of State* (12 B. L. R., 167); *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (7 M. I. A., 476); *The Secretary of State for India in Council* v. *Hari Bhanji* (I. L. R., 5 M. 273); *Nicoll* v. *Glennie* (1 M., and S., 588); *Lewis* v. *Read* (13 M. and W. 834); *Tobin* v. *The Queen* (16 C. B., N. S., 310); and *Buron* v. *Denman*

(2 Ex., 167), referred to, *Nobin Chunder Dey* v. *The Secretary of State for India* (I. L. R., 1 C., 11); and the judgment of *Spankie*, J., in *Kishen Chand* v. *The Secretary of State for India in Council* (I. L. R., 3 A., 829), dissented from.

Held by *Aikman*, J. :—

(1) That the plaintiff had no remedy open to him in the Criminal Courts.

(2) That the action of the Magistrate in seizing and selling the plaintiff's goods was not an act of State, into the legality of, which Municipal Courts were precluded from inquiring.

(3) That although the Crown is not liable for the illegal acts of its servants and cannot be called on to pay compensation or damages for such acts, it can be held liable to make restitution, but only to the extent by which it has benefitted by the illegal acts.

(4) That in the case of property seized and sold under S. 88 or S. 386 of the Code of Criminal Procedure a claimant may proceed against the purchaser, but this does not prevent his proceeding against the Crown if he prefers to do so. *Bukhooree Singh* v. *The Government* (8 W. R., C. R., 207); *The Queen* v. *Chumroo Roy* (7 W. R., Cr, R., 35); *In re Chunder Bhon Singh* (17 W. R., Cr. R., 10); *Queen-Empress* v. *Sheodihal Rai* (I. L. R., 6 All., 487); *Queen-Empress* v. *Kandappa Goundan* (I. L. R., 20 M., 88); *Queen-Empress* v. *Gasper* (I. L. R., 22 C., 935); *The Secretary of State for India in Council* v. *Hari Bhanji* (I. L. R., 5 M., 273); *Musgrave* v. *Pulido* (49 L. J., P. C., 20); *Tobin* v. *The Queen* (16 C. B., N. S., 310); *Kishen Chand* v. *The Secretary of State for India in Council* (I. L. R., 3 All., 829); *The King* v. *The Lords Commissioners of the Treasury* (4 A. and E, 286); *Hettihewage Siman Appu* v. *The Queen's Advocate* (L. R., 9 App. Cas, 571); and *Feather* v. *The Queen* (35 L. J., Q. B., 200); referred to:—*The Allahabad Weekly Notes for* 1898 *p.* 173

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

Good Reading About Many Books selected by their authors *Third year*, by Fisher Unwin.

The Albany Law Journal for Oct. and Nov. (*in exchange*).
The Calcutta Weekly Notes for Oct. and Nov. (*in exchange*).
The Allahabad Weekly Notes for Oct. and Nov. (*in exchange*).
The Green Bag for Oct. and Nov. (*in exchange*).
The Canadian Law Times for Oct. and Nov. (*in exchange*).
The Canada Law Journal for Oct. and Nov. (*in exchange*).
The Educational Review for Oct. and Nov. (*in exchange*).
The Indian Journal of Education for Oct. and Nov. (*in exchange*).

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The High Court sitting list:—We are unable to realize what difficulty his Lordship *Sir Arthur Collins* feels in framing the list of Judges' sittings for more than the brief period of a week. We have more than once pointed out in our pages the trouble and expense that parties are put to, and the great annoyance the practitioners feel in not having sittings lists issued for a month or two months at the same time. Mr. Justice *Shephard*, as Officiating Chief Justice felt no such difficulty; and it was quite a relief to practitioners to have even the sittings of three weeks together let known to them, although even that period was not sufficiently long. With the return of *Sir Arthur Collins* from leave, we are reverting to the old state of things. We understand that representations have been made through the Registrar which have not been heeded. The matter may look very small to laymen. Those that are familiar with the Courts will have no difficulty in realizing the inconvenience. We would impress upon his Lordship the desirability of consulting the convenience of parties and practitioners a little more than he is at present in the habit of doing. For it seems to us the administration of justice does not consist in merely being able to make up a round number of cases disposed of, at the end of each year.

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Chief Justice Strachey:—The elevation of Justice *Strachey* to the Chief Justiceship of Allahabad cannot fail to be looked upon as the reward of political service, though he appears to possess learning and ability of a high order. That a man so young and such a junior in the service as a Judge should have been selected for a Chief Justiceship is not an

event in the ordinary course of things. The reported judgments of the learned Judge seem to us to show elaborate study and care in their preparation. He has not been sufficiently long on the Bench to enable us to pronounce upon the general soundness of his judicial deliverances. If report is true, he appears to have a quick grasp of facts and a ready knowledge of law. If he has got any tendency to dance to the tune of the Executive Government, he would be deficient in a quality which is more prized in a judge than all the learning and ability in the land—judicial independence. He has unfortunately marred his reputation by his one sided and undoubtedly prejudiced charge to the jury in the *Tilak trial.* We have always thought that the great mistake was that of Chief Justice *Farran* in having selected *Mr. Justice Strachey* to preside at the trial of that case. His antecedents as the son of *Sir John Strachey,* a thorough bureaucrat cannot lead one to expect much liberality of views or a sympathetic administration of justice. One so young, without the mellowing influence of age and experience should not have been selected to try a case in connection with which political feeling ran high and even men habitually cool-headed lost their wits. However, we hope, his charge in that case was only the aberration of a strong mind and that he will live long enough not merely to regret that incident of his career but to develop qualities of head and heart which may make him an ornament to the judiciary of the land.

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The Pittapore Case:—News has been received in India that the plaintiff's appeal to the Privy Council will be dismissed. This result was a foregone conclusion to many people although *Mr. Mayne,* Counsel for the appellant, appears to have entertained strong hopes of success. The decision in *Sartaj Kuari* v. *Deoraj Kuari* I. L. R., 10 A., 272 came upon us as a surprise and the last hope of that decision being upset so far at least as this Presidency is concerned, must now be given up for ever. There has been a whole host of decisions in this Presidency treating impartible Zemindaries as inalienable. At one stroke of the pen, in utter violation of the uniform consciousness of lawyers and laymen in Southern India, the Privy Council pronounced Zemindaries alienable at the whim or caprice of any reckless scape-grace. It was conceived that if that uniform course of authority and the ruinous dismemberment of estates were brought to the notice of the Judicial Committee, the decision in I. L. R. 10 A., might be limited to the provinces to which it wss primarily applicable. But even that august tribunal has of late years fallen short of the expectations of lawyers in this country. One thing, of course,

in connection with the conduct of the case in the Court of First Instance, we cannot but regret. We have always wondered why the plaintiff's advisers failed to put forward a case of territorial custom. If there ever was a case in this Presidency in which money was spent like water, it was this. All the resources of wealth and social position and talent were available to substantiate a case of territorial custom. It would have been a matter of no difficulty to collect hundreds of instances in which the parties and the Courts had acted upon the view that impartible Zemindaries were inalienable. The case of family custom that was set up was by no means easy to establish for lack of instances; and possibly the only case which might have succeeded in stemming the tide of ruin consequent upon the decision of the Privy Council in I. L. R. 10 A., has ended without an arm having been lifted in that attempt. Constituted as that tribunal was, there was little prospect of a departure from the law laid down in that case in the absence of the only contention that might have wrung even from an unwilling tribunal a reversal of the law. As matters stand, the only hope for those that have the interest of Zemindaries at heart is to attempt to move the Legislature. It is a very slow-moving machine except for Government measures of taxation. If such a decision as the one in I. L. R. 10 A., had been passed with reference to England, it would have been upset almost the very next day as the decision in *Derry* v. *Peek* was by the action of the Legislature.

Facetiæ.

Custom House Officer: "Open your trunk. Have you anything but personal property?"

Distinguished Lawyer: "What do you call personal property?"

"Don't you know what personal property is?"

"Well, there's no real estate in it.":—*The Green Bag.*

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That canny Scott had a very keen sense of the fitness of things, who, when asked if he had ever been in a court of justice, replied, "No, but I've been before the Judge.":—*The Green Bag.*

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A farmer forwarded a letter to a town inscribed, "To any respectable attorney." The postmaster returned it, indorsed, "None here.":—*The Green Bag.*

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Young Lawyer: "I spent nearly an hour yesterday trying to convince that client of mine he was innocent."

Old Lawyer: "Oh, well, never mind; you'll probably be able to convince the Judge he's guilty in half the time".:—*The Green Bag.*

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The Husband Seducer.—The influential Supreme Court of Pennsylvania has now joined the noble army of Courts which hold that a wife may maintain an action against the seducer or enticer away of her husband, be the offender female or male, *Gernerd* v. *Gernerd,* 185 Pa. St. 549; 40 L. R. A. 549. The defendant was the husband's father. The Court says:—

"The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore* v. *Greenback* (decided in 1745) Willes' Rep. 577. The right of a wife to maintain an action for the same cause has been denied because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when the husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common law disabilities, and may sue in her own name and right for torts done to her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognised and sustained in jurisdictions where she has the capacity to sue, notably in the cases of *Bennett* v. *Bennett,* 116 N. Y. 584, 6 L. R. A. 553; *Foot* v. *Card,* 58 Conn. 4, 6, L. R. A. 829; *Seaver* v. *Adams* 66 N. H. 142; *Westlake* v. *Westtake,* 34 Ohio St. 621, 32 Ann. Rep. 397; *Haynes* v. *Nowlin,* 129 Ind. 581,14 L. R. A. 787; *Warren* v. *Warren,* 89 Mch. 123,14 L. R. A. 545; *Bassett* v. *Bassett* 20, Ill. App. 543; *Price* v. *Price,* 81, Iowa; 693, 29 L. R. A. 150; *Clow* v. *Chapman,* 1125 Mo. 101, 26 L. R. A. 412; *Mehrhoff* v. *Mehrhoff,* 26, Fed. Rep. 14. The New York and Indiana cases cited overrule the earlier cases in those States in which a different conclusion has been reached. The only decisions in which we find the right denied are *Duffies* v. *Duffies,* 76 Wis. 374, 8 L. R. A. 420; and *Doe* v. *Roe,* 82 M. 503, 8 L. R. A, 833,

To the majority may be added *Williams* v. *Williams*, 20 Colo., 51 and *Hodgkinson* v. *Hodgkinson*, 43 Neb. 269, 27 L. R. A. 120 46 Am. St. Rep. 468; and to the minority: *Krossein* v. *Krossein*, 60, Minn, 372; 27 L. R. A. 685.:—*The Green Bag.*

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One of the stories told by Judge Parry who has a keen sense of humour, is says *The Daily News*, of a Jewish woman who was summoned before him for the non-payment, of a week's rent. 'Why don't you pay the money?' he asked her. 'Last Friday week when I was cooking a rabbit——' she began. 'My good woman,' interrupted the Judge, 'never mind the rabbit, but tell me why you didn't you pay the rent. '? 'I am telling you,' retorted the woman, 'if you will only let me. Last Friday week as I was cooking a rabbit, soot fell down and spoiled the rabbit, and do you think that I was going to pay rent for that week?' He tells another story of two Jewish litigants, one of whom offered to bet twenty pounds he was right. Judge Parry turned to the other litigant and asked if he was prepared to make a similar bet, but he replied sadly that he had no money. Later on, however, finding the case going against him, and thinking to strengthen his cause, he cried excitedly 'I will bet ten pounds of my father's attorney."—*The English Law Journal.*

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Mr. Justice Phillimore on facilities to dissolve marriage:—Upon taking his seat in Court on Wednesday morning, the 24th of August 1898, Mr. Justice Phillimore said:—'I understand that of late years it has been considered that those who wish to have their marriages dissolved cannot be expected to wait until after the long vacation, and the duty of making the decrees absolute is imposed upon the Vacation Judge. I was not consulted about this, but, on the whole, I have come to the conclusion that it is my duty to register these decrees. But I cannot take this step without, as a Christian man, saying how sorry I am on social, moral and religious grounds that these facilities should be given to persons to dissolve the marriages they have contracted. But that which the State in its wisdom or unwisdom, has decreed must be carried out by the officers of the law, and as I neither make nor unmake marriages, except as a civil officer, for that purpose the decrees *nisi* must be made absolute.—*The English Law Journal.*

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Gift—Delivery—What Constitutes.—In *Liebe* v. *Battman*, decided by the Supreme Court of Oregon in August, 1898 (54 Pac. R, 179), it

appeared that one about to commit suicide indorsed securities and sealed them in an envelope directed to a friend, with whom he was living, and laid it on a table leaving, a note to the friend containing directions as to the delivery of another letter and inclosure. The two slept in opposite parts of the house, and the friend reached the *felo de se* shortly after the shooting, but the latter became unconscious, and died without making further reference to the gift. It was held that there was no delivery, and this though the donee picked up the envelope during the lifetime of the deceased, where he delivered it to another, and did not open it until after the death.

The Court said:

The transaction is not supported by any valuable consideration, nor does anybody pretend that it is; so that, if there is no gift, Schutz's title must fail. Nor can it make any material difference what may be the quality of the gift, whether *inter vivos* or *causa mortis*, as the essential elements which go to establish it in either case are the same, in so far as the pivotal facts give caste to the transaction. There must be an intention in the donor to give, and a delivery, to pass the title. If *causa mortis*, these things must have been done under the apprehension of death from some present disease or some impending peril, but it is revocable, and becomes void by recovery, escape from such peril, or the death of the donee before the donor (*Ridden* v. *Thrall*, 125 N. Y. 572, 579, 26 N. E. 627). We need only to consider the intention and the alleged delivery. That there was an intent to give we think is perfectly manifest from the evidence adduced. The inclosing of the indorsed promissory note in a sealed envelope, addressed to Schutz, together with the few lines written him touching the envelope addressed to Mrs. Vierea, indicates so strongly that such was the fact as to become insusceptible of serious dispute. It was held in *Caldwell* v. *Wilson* (2 Speer, 75) that "delivery (in case of gift) is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party." This implies, as the facts of the case warrant, that the donor and donee shall also be mutually present. *Andrews*, J., in *Beaver* v. *Beaver* (117 N. Y. 421, 428, 22 N. E. 940, 941), says: "The delivery may be symbolical or actual; that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes or choses in action the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention." Many authorities concur in holding that a declaration

of gift in writing, without a delivery of the chattel, is ineffectual to transfer title, because, not being founded upon a valuable consideration, the supposed contract is *nudum pactum* and may be revoked at the will of the donor. And these, we are impressed, preponderate in weight of authority towards the establishment of the doctrine (see *Young* v. *Young*, 80 N. Y. 422; *Beaver* v. *Beaver*, *supra*; *In re Crawford* [N. Y. App.], 21 N. E. 692; *Connor* v. *Trawick's Adm'r.*, 79 Am. Dec. 58; *Wadd* v. *Hazelton* [N. Y. App.] 32 N. E 143).

There must be a parting with the dominion over the subject-matter of the pretended gift, with a present design that the title shall pass out of the donor to the donee, and this so fully and completely, to all intents and purposes, that if the donor again resumes control over it without the consent of the donee, he becomes a trespasser, for which he incurs a liability over to the donee except after revocation of a gift *causa mortis*. And so essential is delivery as a factor in the transaction that it is said: "Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences." (Thornt. Gifts, § 131; see also *McCord's Adm'r* v. *McCord*, 77 Mo. 166; *Smith* v. *Ferguson*, 90 Ind, 229; *Hatch* v. *Atkinson*, 56 Me. 324; *Wilcox* v. *Matteson*, 53 Wis. 23, 9 N. W. 814; *Board of Sup'rs* v. *Auditor-General* 68 Mich. 659, 665, 36 N. W. 794; *Gano* v. *Fisk*, 43 Ohio St. 462, 3 N. E, 532.) The reason for the rule requiring delivery is obvious, and is founded upon "grounds of public policy and convenience, and to prevent mistake and imposition." (*Noble* v. *Smith*, 2 Johns. 52.)

Measured by the requirements of law, there was no delivery of the note to Schutz, nor does the fact that the note was indorsed dispense with its necessity. Such an indorsement, without considerarion, could not have stronger force or operation than a parol gift or by writing not under seal. Whatever might have been Closter's intention in writing his name on the back of the note, he could revoke the gift before delivery simply by retaining the note, and Schutz could not assert title thereto until something else had been done to complete the transaction. It cannot be said that Closter ever parted with his dominion. If so, when did it occur? Assuredly not before he made the attempt upon his life, for Schutz was not present to receive it. Placing the note upon his table in the sealed envelope addressed to Schutz was not a relinquishment of possession, because it remained with him and under his complete and absolute control. He could, at any instant, while conscious and in his right mind, have bestowed it upon any other person, at his

liking, and Schutz could not have prevented, nor would it have been an invasion of any rights acquired by reason of the indorsement and ensealment within the addressed envelope. And there could have been none after the shooting, for the note was not taken from the table nor mentioned by the deceased. The case can be no stronger than if the sealed envelope had been found among his other effects, for it was upon his table and within a room occupied solely by him. It was his intention, no doubt, that Schutz should find and appropriate it, but the right to make an appropriation did not accrue within the lifetime of Closter, and Schutz cannot now claim the property as against Closter's personal representative:—*The Albany Law Journal.*

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Right of the proprietor of a hotel to allow his guests to use his telephone.—This question recently came before Associate Judge Cox, sitting in the Supreme Court of the District of Columbia, on an application to make an injunction perpetual. It appeared that the plaintiff, Danenhauer, was the proprietor of the Hotel Fredonia in Washington. As such he was a subscriber of the Chesapeake and Potomac Telephone Company. The Company placed one of its instruments in the hotel. Danenhauer permitted patrons of the hotel to use the telephone free of charge. The Company sought to prohibit him from allowing his boarders to use the 'phone, under threat to remove the instrument. Danenhauer told the Company that they could not remove the 'phone The Company started to do so, and Danenhauer obtained a temporary injunction restraining the Company from removing the' phone or interfering with his service.

Justice Cox's decision was rendered after the Court had heard arguments for and against the plaintiff's request to make the injunction permanent. It makes the injunction permanent, but imposes certain requirments upon the plaintiff. In the order continuing the injunction it is required that the telephone must be used strictly for hotel business and for the private business of the proprietor. It stipulates that Danenhauer shall not allow the telephone to be used for other purposes than those mentioned.

"It may be used," the order states, "for the benefit and accommodation of boarders, such as sending for a wagon to call for baggage, but it may not be used by them for other purposes, such as calling for stock reports or the ordering of theatre tickets."

The order further states:—

The Telephone Company is obliged to maintain a special plant, and is entitled to charge for every message sent. All that the law requires is that

the Company shall not discriminate between its patrons, but must serve all persons on the same terms. The explicit terms of the contract, made between the parties in 1896, are that the telephone be for the subscriber's use only, and on a breach of the terms the contract may be violated.

When the subscriber allows others to use his telephone it is an abuse of the time of the telephone operator. It is also an infringement on the rights of the Bell Telephone Company, which receives a royalty from the defendant. Furthermore, it is an infringement of the rights of other subscribers. It is very annoying for a subscriber to call for a certain number and be told that the connection he wants is busy, that being due to the fact that a non-subcriber is using, free of charge the telephone with which connection is desired.

Is the hotel guest entitled to the use of the telephone in the hotel, when no one is entitled to the use of the telegraph if the Telegraph Company has an instrument in the hotel. The guest does not have his telegrams sent free of charge, nor does he secure the service of messengers and the use of carriages without pay. Why should he be allowed to use the telephone without paying for its use?:—*The American Law Review.*

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An English view of the American method of treating crime.—A report on the treatment of crime in America has been submitted to the Home Secretary by Mr. E. Ruggles-Brise. He was invited by the American delegates at the Prison Congress of Paris in 1895 to visit the United States and study the detail of their penal system or systems. The report, a summary of which we take from the *Daily Telegraph*, shows that, on the whole, the greater leniency exhibited towards criminals in America brings out the notorious truth that public sentiment is far tenderer towards those who have been convicted by law than is the case in European countries. Doubtless this accounts, as Mr. Ruggles-Brise suggests, for what the critics have often stigmatized as "the vagaries" of the system.

The general feature common to all the States is that while petty offenders and prisoners awaiting trial are under the care and control of the local authority representing the counties and the cities, persons convicted of serious crime are under the control of the State, and committed either to State prisons or State reformatories. It is to the latter that Mr. Ruggles-Brise directs his attention, and summarizes the results as follows:—

"(*a*) There is no progressive stage system as in England, whereby a prisoner advances by stages or classes from the lowest to the highest, according to his industry and conduct, receiving as he advances in-

creased privileges in the way of letters, visits and gratuity. There is a system of 'grades'—every convict on reception enters the second or intermediate grade, and is liable, in the case of misconduct, to be degraded to the first or lowest, or is able by good conduct, extending over six or twelve months, to be raised to the third or highest. The distinction in some prisons is maintained by a variety of clothing, or perhaps of diet—in others the distinction is more nominal than real.

"(b) In spite of the labour laws these prisons are still for the most part vast factories, conducted under what is known as the 'public account' system or the 'piece price' sytem. Under the former the State manufactures and sells in the open market in the same way as a private employer of labour. Under the latter a contractor supplies the material and machinery and pays so much for the manufactured article. Machinery of the most expensive and modern kind is everywhere in use; and, indeed, to such an extent is trade pursued that at one prison—Columbus—the trade-profits more than paid for the whole cost of the institution, some 280,000 dollars, or £ 56,000 a year.

"(c) Discipline during the hours of labour is, on the whole, well maintained, though with what in England would be considered very inadequate supervision, but the warders all carry firearms, the moral effect of which dispenses with a larger staff.

"(d) After the day's work is over, about half-past four, the men are taken to their cells, and it is during the period intervening between this time and bedtime, about half-past eight, that the relaxations of discipline, of which so much is heard in England, take place. The cells are all lighted with electric light (at Pittsburg tallow candles are allowed in the cells), tobacco-chewing and, in many prisons, smoking is allowed, also the daily and weekly papers. As a rule, a convict is allowed to furnish his cell with pictures, photographs, looking-glasses, etc. The solid cell door used in England is not used except in the punishment cells, iron gratings taking their place, thus rendering communication easy; and the arrangements for night patrol seemed to me to be inadequate, especially having regard to the fact that in most prisons, owing to the insufficient cell accommodation, what is known as 'doubling up,' or two in a cell, is a common practice.

"I visited one large prison late in the evening and nothing could exceed the quiet and orderliness of the place, but at this prison a safety-valve is found for the emotional energies of prisoners by permission being given between six and seven to any convict to exercise himself on any musical instrument that he either knows or may be

ambitious to learn. The discord that ensues, if ungrateful to the musical ear, is alleged to be instrumental towards securing a desire for repose when the bell for cease music is sounded, and certainly when I visited the prison at 10 P.M. you could hear a pin drop, though there were over 1,200 convicts in one long range of cells."

On the question of the reformatory system—which has often been misunderstood in England—there are some interesting remarks. What, in the first place, is the meaning of the system ?

"It is an attempt made at a considerable cost, and by the most ingeniously contrived methods, to deal with the problem of 'juvenile' adult criminality' by other than ordinary punitive or prison methods. It may require a considerable effort to throw oneself into the mental attitude of so many Americans, who are prepared to reject in the case of a certain class of offenders the doctrine of the 'right to punish. One cannot fail to be struck by the relation existing between the ideas of a large school of American penologists and the social doctrines of the French revolutionary period, which we know historically have had a deep influence on American opinion. The particular doctrine is found in the phrase—" La société prépare le crime—le coupable n'est que l'instrument qui l'exécute." In the light of this doctrine it is held that a youthful offender, or, rather, a juvenile adult (the age is fifteen to thirty at Elmira, fifteen to thirty-five at Concord), however serious his crime, is more sinned against than sinning. His crime is due to inherited defect, mental or physical, to vicious environment, to his not having had a chance. The duty of the State, having got this man into its clutches, is not to punish him—*i.e.*, by cellular immuration—for a definite period, and at the end of that time to let him loose upon society, probably no better than he was before, but to regenerate him, physically and mentally, to fit him to take his place among honest citizens, to prevent him from drifting into the ranks of habitual crime."

The methods of reform are physical development by gymnastic and military exercise, intellectual training, manual training from elementary processes to engraving, etching, and carving, and industrial training in masonry, carpentering, etc.

As to the value of the system, although there is much that is extravagant and perhaps ridiculous, the fundamental principle is one that must commend itself to thoughtful people interested in the study of criminal problems. It is, shortly, that, up to a certain age, every criminal is potentially a good citizen; that his lapse is presumably due either to physical degeneracy or bad social environment; that it is the

duty of the State, at least, to try to effect a cure, and not to class the offender offhand and without experiment with the adult professional criminal.

The remaining features of the American system, which Mr. Ruggles-Brise discusses, is the parol law and the practice of indeterminate sentences.

"The right of pardon, corresponding to the exercise of the prerogative of mercy, has always been inherent in the Governor of the State. There has also been a 'good-time' system corresponding to the English ticket-of-leave system, being a month for the first year, two months for the second, and so on, of sentence. This is equal to one-fourth of a five years' sentence and one-third of a ten years'. Of recent years the Legislatures of several States—notably, Ohio, Illinois, and Massachusetts—have introduced in addition the parol system, based on the indeterminate sentence. This indeterminate sentence is of two kinds—(*a*) Where the Judge fixes the minimum and maximum. (*b*) Where no definite sentence is stated in the commitment, it being provided only that the convict must serve the minimum prescribed by statute for the offence of which he is found guilty. This latter operates in Illinois. The former is the more general system. It is clearly explained in the New York law, though curiously, in this State the Courts rarely exercise the power, very few cases having been so dealt with since the law passed in 1890. The Statute runs thus: 'Whenever any male person over sixteen years of age shall be convicted of a felony which is punishable by imprisonment in a State prison, the Cou. t, instead of pronouncing a definite sentence of imprisonment, may pronounce an indeterminate sentence with the minimum and maximum only specified, but the minimum and maximum shall not be less or greater than that prescribed by statute for the offence.' The Parol Board consists of the Superintendent of State prisons, the Warden Chaplain and Physician. Parol may take place when there is 'reasonable possibility that the prisoner will live and remain at liberty without violating the law.'"

On this Mr. Ruggles-Brise comments :—

"In principle the 'parol' system must be condemned. There must be a tendency to flirt with crime if the decision of the Court can be set aside by a body of men, however competent, impartial, and able, who rely merely on the 'observation' of a prisoner while in prison, and upon that decide that A is a good man and can be safely discharged, B is a bad man and must be kept in custody. This uncertainty must

have also the bad disciplinary effect of unsettling the prisoner himself, and must be a fertile source of discontent, and though the system is alleged to afford a great stimulus to good conduct and industry, the right to earn 'good time' on a liberal scale ought to, and in fact does, if properly administered, sufficiently meet this end."

As to the probation system, according to which there exist in Massachusetts officers appointed to inquire into the character and antecedents of prisoners before trial and to report to the Judge, and after trial to take charge of persons whom the Judge may commit to their care, we find the following criticism:—

"Having been present in Court while cases were being dealt with and having conversed with various authorities, I came to the following conclusions with regard to the system: (1) It is no doubt of great advantage to the Judge to be placed in possession of facts concerning each individual case, which enable him, in many cases, to dispense with the necessity of imprisonment. (2) The tutelage exercised by the officers during probation is salutary and beneficial, and calculated to check at its outset a criminal career."

"*Contra.* (1) It is doubtful if public opinion in England would tolerate the preliminary 'inquisition' before trial, statements made by the prisoner being used by the officer of the Court for or against him as the case may be. (2) It is difficult to avoid rivalry and conflict between the police and probation officer, the functions of the latter being to a great extent police duties. (3) Owing to the strong feeling in the State against any breach of the liquor law, and to the enormous number of arrests under it, being three-fourths of the total arrests, the time of the officers is practically absorbed by investigation into cases of simple drunkenness—cases which would not come into Court at all in England, and the original intention of the system—viz.: that all criminal cases should be the subject of preliminary examination—is largely departed from, and the probation officer runs a risk of becoming a mere instrument in the hands of that section of the community which pursues with relentless severity anyone succumbing to the temptation of alcoholic excess. (4) The system is expensive and might become inquisitorial."
—"*Law Times* (London)' :—*The American Law Review.*

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Life Insurance: Suicide—No recovery where the assured, being sane, commits suicide, although not so stipulated in policy.—In the case of *Ritter* v. *Mutual Life Ins. Co.*, 169. N. S. 139 the Supreme Court of the United States had before it (in addition to some questions of procedure)

the question whether intentional self-destruction by the assured, he being of sound mind, is in itself a defence to an action upon a life policy, although the policy, does not, in express words, declare that it shall be void in the event of self-destruction, when the assured is of sound mind. In point of fact, the application for the policy did contain a warranty on the part of the assured that he would not commit suicide within two years, but as a copy of this was not annexed to the policy, it was excluded from evidence, as required by the statute of Pennsylvania; so that the naked question was left as above stated. The Court unanimously hold that there is in every contract of life insurance an implied engagement on the part of the assured that he will not, being of sound mind, destroy his own life. The reasoning of the Court, in its opinion written by Mr. Justice Harlan, is unanswerable. He places the parties to the contract before the readers of the opinion, at the time when they made the contract, and he supposes that they had inserted in the contract a provision that the amount insured should be paid, although the assured might voluntarily commit suicide while being of sound mind, and he asked whether a contract thus tempting one to self-destruction and fraud would not be set aside on the ground of public policy. He points out that in every such contract the premium to be paid to the Company for assuming the risk is founded on the probable expectation of life, as collected from experience, excluding the contingency of self-destruction. In fact, he shows that it is necessarily contemplated by the parties to the contract, that the assured will not voluntarily, while understanding the quality of his act, do anything that will operate to enlarge the burden of risk which is assumed by the insurer. A good many precedents are examined, and while we do not see among them any cases precisely in point, yet the Court found in the analogy of *Fauntleroy's* case, (4 Bligh, W. R. 194, 211) strong support for its conclusion. That was an action by an assignee in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of Fauntleroy, to his executors, administrators or assigns. The assured was convicted of forgery and capitally executed. The question, therefore, was whether the parties representing and claiming under one who had effected an insurance upon his life, and afterwards committed a capital felony for which he was tried and executed, could recover upon the policy. It was held by the House of Lords that he could not, and for two reasons: First, it could not be supposed that such a risk had been insured against, or that it was the understanding of the parties that such a risk was covered. Secondly, if such a risk had been insured against in express terms, so much of the policy as insured against it would have been void as contrary to the policy of the law.

The position of the Supreme Court of the United States, in the case under comment, affirming the United States Court of Appeals, 28 U S. app., 612. will appear the more sound and wholesome when the facts of the case are considered. The assured had become liable for breaches of trust in sums which he could not discharge, and he deliberately determined to pile fraud upon fraud by insuring his life for a large amount and then committing suicide. With this end in view he loaded his life down with policies, taking out six in the particular Company, which aggregated seventy-five thousand dollars, and having at the time of his suicide an insurance upon his life amounting to half a million dollars. In order to protect the beneficiaries in the trusts whose money he had made away with, he determined that innocent third parties should bear the loss for him, namely, the members and stockholders of various Insurance Companies who would have to lose it, in the case of Mutual Companies by increased assessments, and in the case of Joint-Stock Companies by diminished dividends. A statement of the facts of the case vindicates the wisdom and justice of the conclusion of the Court. Cases are arising at frequent intervals where desperate men resort to the means—if that expression may be used—of making money by committing suicide. Decisions of this nature warn such persons that the attempt will not be successful. :—*The American Law Review.*

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Res Judicata: extends to adjudications between the same parties or their privies, athough the suit is for a different cause of action.—In the case of *Southern Pacific R. Co.* v. *United States* (168. U S. 1.) decided by the Supreme Court of the United States at its present term in which the opinion of the court is written by Mr. Justice Harlan there is an elaborate discussion of the doctrine of *res judicata.* The court held that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if that suit is for a different cause of action. Applying this principle, the conclusion of the Court was that a decision as to the sufficiency of maps to make a definite location or designation of the route of a railroad, on which the title to lands included in a railroad grant depends, is conclusive in another action then pending between the same parties, respecting other lands within the same grant. The court also held that an adjudication of a fact on which depends the title to lands in controversy is conclusive as between the parties, in respect to the title of other lands depending upon the existence or non-existence of that fact. The Court further held that it is not necessary to plead the estoppel of a former judgment, in order that the party may avail himself of it, but that a former judgment, if admissible in evidence is conclusive on the matters in issue, and actually determined by it,

although not pleaded. The propriety of the ruling of the court on this last point seems doubtful. The general rule is understood to be that estoppels must be pleaded. This seems obviously necessary to prevent the parties against whom they are raised from being taken by surprise, by raising them for the first time by tenders of evidence. The court, however, cites a great mass of authority in favor of the doctrine laid down by Professor Greenleaf, (1 Greenley, Sec. 531) [1] and says that: "The weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel." ;—*The American Law Review.*

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Negligence: proximate and remote cause—Intervention of stranger to prevent horse from running away. Willis v. *Providence Telegram Pub. Co.* (38 Alt. Rep. 947) the Supreme Court of Rhode Island held that where plaintiff's horse became frightened by a collision with defendant's negligently driven team, and plaintiff seized her horse by the bridle rein in her attempt to prevent him from running away, and was injured in so doing (her baby being in the wagon to which her horse was hitched at the time), the proximate cause of the injury could not be said, as a matter of law, to be some act intervening between the collision and the injury. In the course of its opinion, wriiten by *Tillinghast,* J., the Court said ;—

In the case of *McDonald* v. *Snelling,* (14 Allen. 290) where the question as to the proximate cause of an injury caused by a runawayhorse through the negligence of the defendant was very fully considered, the court, in overruling the demurrer to the declaration, said, among other things: "It is clear, from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence, as a result which might reasonably have been foreseen as probable, the legal liability continues." In *Mahogany* v. *Ward,* (16. R. I. 479; 17 Atl. 860) this Court recognized the same doctrine; for while it was there held that the independent act of a responsible person arrests causation, and is to be regarded as the proximate cause of the injury, the original negligence being considered merely the remote cause thereof, yet the Court said that this rule "is subject to the qualification that, if the intervening act is such as might reasonably have been anticipated as the natural and probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable." See, also, *Lee Railroad Co*; 12. R. I. 383. It certainly cannot be said that

a person who attempts to prevent his horse from running away when it has become frightened by a collision with another team is necessarily guilty of negligence, even though the person in charge of the horse is not in his carriage, and does not actually have hold of the reins, at the time of the collision. And this is even more clearly so when a helpless child is in the carriage, and when the first impluse of every rational person would be to prevent the horse from running away. Whether or not the act of the plaintiff in any given case is in fact a rash, or even negligent, one, and hence such as would prevent him from recovering in an action of this sort, is for the jury to determine in view of all the circumstances of the particular case. :—*The American Law Review.*

REVIEWS.

A Treatise on Aliya Santana Law and Usage by Gangolly Krishna Rao, B.A., LL.B., 1st Grade Pleader, Mangalore. :—*Price* Rs. 2-8.

The want of a text-book on Aliya Santana Law has long been felt. Mr. Krishna Rao's book will, we feel sure, supply the want in a large measure. The case-law has been carefully collected: and texts of Bhutala Pandiya, whose work was till recently supposed to be of high authority, have been referred to. Where the author tries to make out that the Aliya Santana Law is completely different from the Hindu Law and that the rules of Hindu Law can no more be applicable to the Aliya Santana Law than to people governed by Muhammadan Law or to Parsis, we cannot agree with him. On the other hand, the Aliya Santana Law, like the Marumakkatayam Law of Malabar, is in many parts only an archaic type of Hindu Law. And the principles of Hindu Law would in many cases be applicable where no usage to the contrary is established. The Chapter on Marriage will be found interesting reading even by laymen. And the chapter on the comparison between the Aliya Santana Law and the Malabar Law is instructive. We are by no means sure that the Aliya Santana rule that the self-acquired property of a deceased member of a family should go to the members of his branch is not the correct rule with regard to the Malabar Law also. Anybody acquainted with Malabar knows that, as a matter of fact, the nephews and sisters of a man take his property and not the Karanavan of his tarwad. Mr. Krishna Rao's book will, we feel sure, be found to be useful and we have no hesitation in recommending it to the profession.